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NO. 81-2149

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERMAN SOLEM, Warden
South Dakota State Penitentiary,

Petitioner,

v.

NORMAN STUMES,

Respondent,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whethe Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), which held that an in-custody suspect who asserts his right to counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police, is to be applied retroactively?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in the appendix attached to the Petition for Writ of Certiorari.

The opinion of the United States District Court for the District of South Dakota appears in the Joint Appendix.

The opinion of the South Dakota Supreme Court appears in the Joint Appendix and is also reported with the following citation: State v. Stumes, 90 S.D. 382, 241 N.W.2d 587 (1976).

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HERMAN SOLEM, Warden
South Dakota State Penitentiary,

Petitioner,

v.

NORMAN STUMES,

Respondent,

JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit Court of Appeals was entered on March 1, 1982. The Petition for Writ of Certiorari was applied for on April 30, 1982, within the time set by Rule 20.2 of the

Rules of the Supreme Court. The Petition for Writ of Certiorari was granted on July 6, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service and time of War or public danger; nor shall any person be subject for the same offense to twice be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On the afternoon of September 17, 1973, the body of Joyce Hoff was discovered in the bedroom of her Sioux Falls, South Dakota, apartment. Later that day, the Minnehaha County Coroner performed an autopsy on the body. The Coroner concluded that Ms. Hoff had not

died a natural death, but had died from a lack of oxygen, either anoxia or asphyxiation. Trial Transcript at 566. The Coroner's examination revealed that the victim had a bruise on her right cheek and cuts on the bridge of her nose and on her lips. In addition, a spray can top had been forced into the victim's vagina. Trial Transcript at 573, 576.

On September 27, 1973, the Respondent, Norman Stumes, was arrested in Green Bay, Wisconsin, on charges unrelated to the Hoff homicide. Stumes was advised of his constitutional rights under Miranda and placed in the Brown County, Wisconsin, jail.

On September 30, 1973, a group of Sioux Falls police officers left for Green Bay, Wisconsin, to return Stumes to South Dakota. Detectives James Green and

Don Skadsen took a commercial flight to Green Bay, while Deputy Headrick drove the automobile to Wisconsin that would be used to transport Stumes. The interest in securing Stumes' return to South Dakota was caused not only by the other charges against him, but, because he had become a suspect in the Hoff homicide.

Stumes' mother retained a Sioux Falls attorney, Steve Jorgensen, to represent the Respondent. That attorney was notified when Stumes was arrested, and actually received a telephone call from Stumes while he was in custody. Mr. Jorgensen advised Stumes that he should not make any statement until he had been returned to Sioux Falls and had consulted with Jorgensen. Evidentiary Hearing, October 6, 1977, at 8.

Stumes was first interviewed by the Sioux Falls police officers on October 1, 1973. Detective Green was alone with Stumes that morning, and talked with the Respondent for an hour and a half concerning the Hoff killing. Detective Green advised Stumes of his Miranda rights before discussing the crime, and Stumes indicated his willingness to talk. Upon being asked whether he would submit to a polygraph examination, Stumes stated:

> I'd rather not answer that question until I talk to Steve.'

Trial Transcript 461.

Detective Green ceased questioning Stumes at that point, approximately 11:45 a.m.

At approximately 4:30 p.m. on the afternoon of October 1, Detective Green,

accompanied by Detective Skadsen, returned to talk with Stumes. At this session, Stumes was not given his Miranda warnings. In response to the only question Detective Green asked that afternoon, Stumes said that Joyce Hoff's death was accidental. Trial Transcript 35.

The following morning, October 2, 1973, Detectives Green and Skadsen, and Deputy Headrick, returned to the Brown County Jail to take Stumes back to South Dakota. Shortly after beginning the trip, Detective Green once again advised the Respondent of his constitutional rights. Stumes indicated that he understood his rights and was willing to talk.

The trip was somewhat uneventful until about 90 miles out of Sioux Falls, South Dakota, when Stumes suffered "a little conflict" with his emotions, and

stated that he "couldn't understand why anybody would want to kill Joyce, and that the taking of a human life is so useless." Trial Transcript 625. There was no interrogation occurring at that time. In fact, there had been no conversation for approximately fifteen minutes. Trial Transcript 626. Detective Green then advised Stumes that he would "feel better after he got this off his chest." Trial Transcript 42. Stumes then related the story of how Joyce Hoff died. Id. After Stumes had finished, Green asked him if he would be willing to give a statement when they arrived in Sioux Falls. In the words of Detective Green:

> I told him at that time that his attorney would probably advise him not to. He [Stumes] said he didn't give a damn what his attorney said; he could talk to anybody he wanted to.

Trial Transcript 44.

Upon arrival in Sioux Falls, Stumes was placed in the Minnehaha County Jail. Shortly after admission to the jail, Stumes indicated that he wanted to speak to Detective Skadsen. According to Detective Skadsen:

> He [Stumes] was crying again, and he put his head on my shoulder, and he said, 'Please tell them that I didn't mean to kill her, that it was an accident--that I am not a vicious killer.'

Trial Transcript 547.

Prior to his trial for the murder of Joyce Hoff, Stumes moved the court to suppress the statements made to Green and Skadsen. The motion was denied, the detectives testified at his trial, Stumes was convicted of first-degree manslaughter and sentenced to life imprisonment at the South Dakota State Penitentiary. On appeal to the South Dakota Supreme Court, the case was remanded to the trial

court with instructions to enter Findings of Fact and Conclusions of Law supporting the court s denial of Stumes' motion to suppress his admissions. 241 N.W.2d 587.

The trial court entered its Findings and Conclusions, and Respondent's conviction was thereby affirmed. Id.

Stumes filed his Petition for Habeas Corpus relief under 28 U.S.C. § 2254 on May 3, 1977, in the Southern Division of the District Court for the District of South Dakota. The district court held evidentiary hearings on October 6, 1977, and May 19, 1978. An additional hearing was held on December 19, 1980, to receive police reports in Stumes' possession which had not been introduced at the previous evidentiary hearings.

The district court, in its Memorandum Decision of April 10, 1981, denied Stumes' Application for Writ of Habeas

Corpus. The court found that Stumes had not suffered any deprivation of either his Sixth Amendment or Fifth Amendment rights.

Edwards v. Arizona was decided by this Court on May 18, 1981. On May 31, 1981, Stumes filed his Notice of Appeal of the district court's denial of habeas corpus relief. The Appeals Court, in its opinion of March 1, 1982, held that Edwards required reversal of the district court's decision and ordered that court to issue the writ discharging Stumes unless the State began proceedings to retry the Respondent. Petitioner Solem then sought a writ of certiorari in this Court, and, in the interim, moved the district court to stay the execution of the Court of Appeals' Order. The district court granted the Petitioner's

Motion and this Court granted the writ of certiorari on July 6, 1983.

SUMMARY OF ARGUMENT

Retroactive application of Edwards v. Arizona is not mandated by the United States Constitution. Edwards' emphasis upon the initiation of further dialogue with the suspect who has invoked his right to counsel establishes a new constitutional standard, not foreshadowed by previous decisions of this Court, and should only be applied prospectively.

The criteria for determining whether a new constitutional rule should be applied retroactively requires examination of the rule's purpose, the extent of reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards.

Brown v. Louisana, 447 U.S. 323, 328 (1980). A rule which corrects any aspect of a criminal trial which impairs its truth-finding function and raises questions about the accuracy of guilty verdicts is to be given retroactive effect. Id.

The Fifth Amendment right to counsel is not primarily concerned with trial truth determination or reliability of verdict. The paramount purpose of the right to counsel is to compel police to conduct custodial interrogations within constitutional dictates and to allow a suspect in custody to exercise his constitutional rights. Retroactive application of Edwards would not further this dual purpose. Retrial of Stumes and possible acquittal of those convicted on trustworthy evidence pursuant to then existing

constitutional standards does not serve the purpose of the rule announced in Edwards. Law enforcement officials had justifiably relied on pre-Edwards standards concerning custodial interrogation, and retroactive application of Edwards would result in retrial of those whose justified convictions have long since become final.

Assuming arguendo, that this Court decides that Edwards does apply retroactively, the State urges this Court to find that the Respondent initiated further conversation with the police, after having requested counsel, and that, viewed in the totality of circumstances, Respondent voluntarily, knowingly, and intelligently waived his right to counsel, and that any statements and admissions made by Respondent were properly admitted into evidence.

ARGUMENTS AND AUTHORITIES

Edwards v. Arizona, supra, which held that an in-custody suspect who asserts his right to counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with police, should not be applied retroactively.

A. PARAMETERS OF CUSTODIAL INTERROGATION UNDER THE FIFTH AMENDMENT.

This Court, in its landmark decision of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), established the procedural guidelines necessary to ensure that criminal suspects subject to custodial interrogation would have the opportunity to exercise their privilege against self-incrimination. The Court

was particularly concerned with the pressures custodial questioning could have on one not assisted by an attorney, and sought to restrain police from using overbearing interrogation practices:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. Illinois, 378 U.S. 478, 490, note 14, 12 L.Ed.2d 977, 986, 84 S.Ct. 1758.[1]

Miranda, 384 U.S. 475.

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[1] Escobedo was concerned with the Sixth Amendment right to counsel, in addition to the Fifth Amendment. As the Sixth Amendment right to counsel does not attach until "adversary judicial proceedings" have begun, see Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), and such proceedings had not been commenced in Stumes' case, the Sixth Amendment is not involved.

While the Court in Miranda saw custodial interrogation as inherently coercive, it did not exclude all statements obtained in such a setting. Statements volunteered by a suspect are admissible. Miranda, supra, 726.

The Court, in deciding Miranda was necessarily concerned with the issue of when a suspect had waived his rights to silence and to counsel. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and

conduct of the accused." Id. Noting the high standards of the past concerning waiver of constitutional rights, see Johnson v. Zerbst, supra, and yet determined to protect those subject to custodial interrogation, the Court issued its Miranda opinion, an opinion which has been refined through the years.

In Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), this Court confronted the situation where an in custody suspect had invoked his right to silence, but had not requested an attorney. After once again being advised of his constitutional rights, the accused was questioned and made several incriminating statements. The Court found no violation of Miranda, noting that the police are prohibited from interrogating a suspect after a momentary cessation when the accused invokes his right to

silence. Michigan v. Mosley, supra, 423 U.S. 102. However, the Court stopped short of mandating a blanket prohibition against the taking of further statements:

> We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut-off questioning' was 'scrupulously honored.' [Footnote omitted.]

Mosley, supra, Id.

In addition to the strictures of Miranda and the need to "scrupulously honor" the assertion of rights by the accused, this Court has continued to examine the totality of circumstances surrounding an alleged waiver of constitutional rights and the need to assertain whether a waiver has been made knowingly and voluntarily. Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). At no time, however, has an

expressed written or oral statement of waiver been necessary to establish a valid waiver of a suspect's Fifth Amendment rights. North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed. 286 (1979). The State must present evidence demonstrating that the Defendant made a knowing and intelligent waiver. Tague v. Louisiana, 444 U.S. 469, 100 S.Ct. 652, 62 L.Ed.2d 622 (1980).

In Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), this Court encountered the difficult problem of determining what constitutes an interrogation for the purposes of triggering the applicability of Miranda.

In Innis, a suspect had been twice advised of his constitutional rights at the scene of arrest and had requested an

attorney. The suspect was placed in the police automobile for transportation to the station. During the trip the accused indicated that he would point out the location of the murder weapon. Shortly before the defendant's statement, however, the officers in the automobile had expressed, to each other, their concern that the gun might be discovered by a young child. While acknowledging that the Miranda safeguards are required when a suspect in custody is subjected to interrogation, Innis, supra, 446 U.S. 300, the Court held that no interrogation had occurred. Innis, supra, 302. While the accused may have been exposed to "subtle compulsion," that was insufficient to establish a violation of Miranda. Innis, supra, 303.

Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), reiterated the Court's adherence to the Miranda standards. While once again noting that the waivers of counsel must be voluntary, knowing and intelligent, Edwards, supra, 451 U.S. 483, this Court set its standard for custodial interrogation under the Fifth Amendment:

> . . . we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.[8] We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. [Footnote omitted.]

Edwards, supra at 484.

The court went on to state that the "totality of the circumstances" must be examined to determine if a valid waiver had occurred and that the accused, not the police, must have reopened dialogue with the authorities. Edwards, supra at 387, n.9. Edwards, did not however, establish a "per se" rule concerning the waiver of right to counsel. Wyrick v. Fields, ___ U.S. ___, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982).

Finally, in Oregon v. Bradshaw, ___ U.S. ____, 103 S.Ct. 2830, ____ L.Ed.2d ___ (1983), the Court refined Edwards and indicated how the state could meet its "heavy burden" under Miranda of showing a valid waiver of the right to counsel. This Court clearly stated that the initiation of a conversation with the police by

the accused did not amount to waiver, Bradshaw, supra, 103 S.Ct. at 2834. The two-step analysis set out by the plurality indicated that once an accused, having indicated his desire to have counsel, "initiates" a conversation with police, the court must determine whether a valid waiver took place by examining the totality of the circumstances. In other words, initiation of a conversation is not sufficient in itself to constitute a waiver.

Whether conversation has been initiated, thereby allowing further interrogation, depends upon whether the accused sought to open up "a more generalized discussion relating directly or indirectly to the investigation." Bradshaw, supra at 2835. Statements by the accused "relating to routine incidents of the custodial relationship, will

not generally 'initiate' a conversation in the sense in which that word was used in Edwards." Id.

In its opinion reversing the district court's denial of Stumes' application for habeas corpus relief, the Eighth Circuit Court of Appeals was particularly concerned with his admissions of October 2, 1973. The fact that Stumes told the detectives at the end of the day on October 1, 1973, that he didn't want to talk about Joyce Hoff's death until he spoke with his attorney indicated, at least to the appeals court, that Stumes should not have been interrogated further until counsel was provided. Stumes v. Solem, 671 F.2d 1150 (8th Cir. 1982). The court held that Stumes' rights had been violated on the following day, on the trip back to Sioux

Falls, South Dakota, when the detectives spoke to him concerning the Hoff homicide. Id.

The Eighth Circuit has misconstrued the Edwards decision. Edwards did not establish a "per se" rule prohibiting interrogation once a suspect has invoked his right to counsel. Whether an accused may be later interrogated depends upon whether he has initiated a further exchange with the police, a fact to be determined by viewing all of the relevant circumstances.

Stumes, on October 2, 1973, was again advised of his constitutional rights before the journey from Green Bay, Wisconsin, to Sioux Falls, South Dakota, had barely begun. As the district court pointed out, Stumes was not a novice in dealing with law enforcement. 511 F.Supp. at 1324. He was aware of the

consequences of any comments he might make.

Stumes himself testified at his trial that direct interrogation did not take place during the trip, (Trial Transcript 624) and that "general conversation" engaged the travelers. Trial Transcript 625. When Stumes suffered the "little conflict" with his emotions later on in the afternoon of October 2, 1973, and stated that he "couldn't understand how anybody would want to kill Joyce," and that "the taking of a human life is so useless," he was not being coerced in any manner. There had been no interrogation at that time. In fact, as Stumes testified:

> I don't think there was any conversation in the car for maybe ten or fifteen minutes. [before he made his statement].

Trial Transcript 626.

Stumes had clearly, within the teachings of Edwards, 'initiated' further dialogue with the police. Stumes then related how Joyce Hoff had died on September 17, 1973. Trial Transcript 42-43. Detective Green then admonished Stumes that his attorney would not want him to make a statement to the police, but Stumes indicated his willingness to ignore his counsel's advice and talk to anyone he pleased. Trial Transcript 44.

Viewed within the totality of circumstances, Stumes waived his right to counsel. He had been given his Miranda warnings, not only on October 2, but the day before, and on September 27, 1973, when he was arrested. Trial Transcript 665. He was experienced in dealing with law enforcement and the courts and, at the time he made his statements and

admissions, there had been no conversations within the automobile for approximately fifteen minutes. In addition, as the district court found, Stumes previous request to terminate questioning were "scrupulously honored" and he was free to make the same request during the trip to Sioux Falls, South Dakota. Finally, Stumes' statement that he would talk to anyone he wanted, indicated his willingness to discuss the homicide with the police.

After Stumes had been placed in the Minnehaha County Jail in Sioux Falls, South Dakota, on the evening of October 2, 1973, he made statements that Joyce Hoff's death had been accidental and that he was not a vicious killer. Trial Transcript 46. These statements were made only after Stumes had requested

that Detective Skadsen come to his cell. Id. These statements were not the result of any questioning by police. Clearly, Stumes had initiated a new dialogue with the police. Viewed in the totality of the circumstances, i.e., an experienced criminal who had been previously given Miranda warnings and told that he was a suspect in the Hoff homicide, (Trial Transcript 619) and that he was not subject to any coercion at the time he spoke to Detective Skadsen, there can be no doubt that Stumes waived his right to silence and to counsel.

While the give and take of conversation during the trip to Sioux Falls may have exerted a "subtle compulsion," see Rhode Island v. Innis, supra, upon the Respondent, such influences were not

sufficient to induce Stumes to involuntarily incriminate himself. Even a retroactive application of Edwards justifies the denial of habeas corpus relief to the Respondent.

B. RETROACTIVE APPLICATION OF A NEW STANDARD OF CRIMINAL PROCEDURE IS NOT REQUIRED BY THE UNITED STATES CONSTITUTION.

It is clear that the Constitution neither prohibits nor requires retrospective effect of a constitutional rule of criminal procedure. Linkletter v. Walker, 381 U.S. 618, 629, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); Tehan v. United States ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966); Brown v. Louisana, 447 U.S. 323, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980). The question of retroactivity is not determined by the particular provision of the Constitution on which the new rule is

based. Brown v. Louisana, supra, 447 U.S. 327. The court may make a rule prospective when the exigencies of the situation so require. Johnson v. New Jersey, 384 U.S. 719 (1966).

> Where the major purpose of new constitutional doctrine is to overcome the aspect of the criminal trial that substantially impairs the truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect.

Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971) (plurality opinion of White, J.). However, when the purpose of the new rule is not to avoid inaccurate guilty verdicts, but other reasons exist for its establishment, then retroactive effect is not prescribed. Id.

This Court has set out its test for determining when retrospective application of a new standard is appropriate:

> . . . the test consistently applied by the court to decide whether a new constitutional doctrine should be applied retroactively contemplates the consideration of three criteria:
>
> > (a) the purpose to be served by the new standards, (b) the extent of the reliance on law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retrospective application of the new standards. Stovall v. Denno, 388 U.S. 293, 297, 18 L.Ed.2d 1199, 87 S.Ct. 1967 (1967).

Brown v. Louisana, supra, 447 U.S. 328.

The purpose of the new rule is the most important of the above criteria. Id. It is a matter of degree concerning the extent to which the purpose of a new

rule requires retroactive application. Id. A rule which prevents unfairness at trial is not automatically to be applied retroactively. Id. at 329. "In short, '[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a question of probabilities." [citations omitted]. "And only when an assessment of those probabilities indicates the condemned practice casts doubt upon the reliabilty of the determinations of guilt in past criminal cases must a new procedural rule be applied retroactively." Id. See also, Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977).

While the above discussion sets out this Court's general principals concerning retroactive application of a new constitutional rule, there have been many

cases dealing with the issue of retroactivity of particular constitutional guarantees. Among these decisions are those involving the Fifth Amendment's right to counsel.

This Court has held on many occasions that the Miranda decision is not required to be applied retroactively. Johnson v. New Jersey, supra; Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966); Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967).

In Johnson v. New Jersey, supra, the petitioner asserted the retroactivity of Escobedo. Miranda having been decided one week before the Court's opinion in Johnson was also discussed. This Court was concerned with the availability of other safeguards to protect the integrity

of the truth-determining process at trial, but concluded that neither Escobedo nor Miranda should be retroactively applied. This Court recognized the retroactive application would not have the "justifiable effect of curing error committed in disregard of constitutional rulings already clearly foreshadowed." Johnson, supra, 384 U.S. 731. In addition, the Court realized that the " . . . retroactive application of Escobedo and Miranda would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." Id.

The Miranda rules have also been held unapplicable to a retrial of a case

originally tried before the Miranda decision was rendered. Jenkins v. Delaware, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969). This Court's reticence to impart retroactive effect to its decisions has extended to other constitutional guarantees. See, for example, Stovall v. Denno, supra, (rule requiring counsel at identification proceedings prospective only); Mackey v. United States, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (privilege against self-incrimination valid defense to charge of failure to register as gambler and pay wagering excise taxes held not retroactive).[2]

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[2] Two state courts agree that Edwards should not be applied retroactively. See State v. McCloskey, 90 N.J. 18, 446 At.2d 1201 (1982), and State v. Shea, 421 So.2d 200 (La. 1982).

Applying the principles contained in the foregoing discussion clearly militates against the retroactive application of underlying Edwards. The Edwards decision does not represent only an amplification of Miranda. In Edwards, this Court focused on the "initiation" aspect of custodial interrogation. The emphasis on who initiated further dialogue with the accused had not been the most significant consideration in the cases prior to Edwards. That decision, however, brought the initiation issue to the forefront. Police, in addition to the guidelines stated in Miranda, must now be careful not to initiate a conversation with a suspect who has invoked his right to counsel. Before Edwards, a simple inquiry as to whether an accused had changed his mind and wished to speak

to the police in the absence of counsel, would likely not have implicated the suspect's constitutional rights. A similar inquiry, under Edwards, incurs the risk of being characterized as police-initiated interrogation by a reviewing court, and any statements made by the accused liable to suppression. The initiation issue was simply not foreshadowed by other decisions of this Court, and the prohibition on statements made after counsel has been requested represents new constitutional doctrine.

In applying the criteria utilized to determine whether a rule is to be applied retroactively, it is important to note that preservation of the truthfinding process at trial remains a paramount consideration. The purpose of a new rule should be viewed in that context.

The purpose of the constitutional doctrine established in Edwards is not solely connected with ensuring reliable results at trial. Rather, the prohibition against using confessions obtained in the absence of counsel can serve multiple ends. For example, one purpose served by the Fifth Amendment's right to counsel is that of deterring police misconduct in the custodial setting. The police, under Miranda, know that an illegally obtained confession is subject to exclusion. In this manner, the Miranda and Edwards decisions served to motivate police to conform their behavior to constitutional dictates. Related to this consideration is the extremely important end of ensuring that the putative defendant will have the opportunity to exercise his right to counsel. The

concerns above--deterring police misconduct and ensuring that the suspect may exercise his constitutional rights--do not directly implicate truthfinding at trial. If, for example, a justly accused individual whose confession would provide the police with perhaps their only evidence of his involvement in a crime, exercises his right to counsel and to remain silent, and does not give his would-be interrogators a statement, he may well be acquitted if tried. In addition, a guilty individual whose custodial confessions, taken in violation of his rights, were suppressed and excluded from evidence might also be acquitted, if no other available evidence of his guilt were available.

The above examples illustrate that the ensuring of reliable verdicts at trial is subordinated, under the Fifth

Amendment, to the concerns of conforming police conduct to constitutional requirements and guaranteeing that suspects may exercise their constitutional rights. If securing the truth at trial was the sole purpose of the Fifth Amendment, then truthful confessions, even if obtained in violation of a defendant's constitutional rights, would always be admitted into evidence. The purpose of the Edwards rule is to exclude confessions, even if truthful, obtained outside of constitutional dictates. The rule in Edwards, not being directed to repairing any part of the criminal trial which impairs the ascertaining of truth and not concerned with reliability of verdicts, should not be applied retroactively.

As to the second part of the retroactivity test, law enforcement authorities

have relied quite heavily upon the pre-Edwards standards. Those standards clearly established the consequences of obtaining a custodial confession from a suspect who had requested counsel. Those cases did not, however, place such an emphasis upon the initiation of further dialogue with an accused. Nor did they place the police at such constitutional peril for simply inquiring whether a suspect, previously unwilling, had changed his mind and wanted to talk to the police. Edwards created such uncertainty and narrowed the area of acceptable police conduct during custodial interrogation. This Court's decision in Edwards was not foreshadowed by previous cases and upset reliance on what was thought to be clear precedent.

The final consideration regarding retroactivity is that of the effect the

retrospective application of the new rule will have on the administration of justice. This Court, in Williams v. United States, 401 U.S. 646 (1971), refused to apply Chimel v. United States, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) retroactively reasoning that:

> . . . ordering new trials . . . would have involved not only expense and effort but the inevitable risk of unavailable witnesses and faulty memories: the authorities might not have had the evidence they once had and might have been foreclosed from obtaining other evidence that might have secured had they known the evidence they were using was constitutionally suspect.

Williams, 401 U.S. 654.

The above is particularly pertinent to this appeal. The victim in this case was killed ten years ago. If the state has to retry Stumes it will have to attempt to locate witnesses, and those

witnesses will have to try to recollect the events of a decade ago. Other types of evidence, such as hair samples taken from the Respondent and the victim, will have to be located, if they still exist. Obtaining an evidentiary substitute for Stumes' confession will be a difficult, if not impossible, task. The cost of retrying criminals, whose convictions law enforcement officials had long considered final, may well include allowing guilty individuals to walk free.

The evidence in this case does not indicate that the jury reached an unreliable verdict. For example, Stumes testified at trial that he went to Joyce Hoff's apartment in the late night hours of September 16, 1973, had sexual intercourse with her and remained in the apartment until the following morning. Trial Transcript 604-614. Her body was

discovered on the afternoon of September 17, 1973. Hair found on the victim's body was identified as matching hairs taken from Stumes. Trial Transcript 354-356. These items of evidence, among others, in combination with his confession, indicate that Stumes was guilty of killing Joyce Hoff.

Also, time for direct review of Stumes' conviction has long since passed and in this case represents a collateral attack by way of habeas corpus, on his conviction. An approach to the retroactivity issue which is fair to both the individual who seeks review of his conviction and the prosecution is noted by Justice Powell in his concurring opinion in Hankerson v. North Carolina, 432 U.S. 248. That approach would have courts apply a new rule retroactively in cases

pending on direct review, while cases on collateral review would be judged by the rule existing when conviction became final.[3]

Finally, the retroactive application of Edwards is not mandated by the lack of safeguards to protect the rights of criminal suspects. The Miranda standards are still intact and serve to adequately protect those subject to custodial interrogation. For example, an individual who has made statements allegedly induced by unconstitutional police conduct is free to raise his contentions in a pretrial motion to suppress. A finding that the

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[3] Justice Harlan had first suggested such an approach in Mackey v. United States, supra, 401 U.S. 675-702. He, however, saw an exception to this approach for cases such as Miranda.

statements were not made knowingly, intelligently, and voluntarily will result in their suppression. In sum, the continued application of Miranda and its pre-Edwards progeny militate against the retroactive application of Edwards.

CONCLUSION

Within the perameters of Brown v. Louisana, supra, and Linkletter v. Walker, supra, retroactive application of Edwards is clearly improper and not mandated by the Constitution.

Therefore, the State of South Dakota respectfully requests that this Court reverse the Judgment of the Eighth Circuit Court of Appeals and find that

Respondent was not entitled to habeas corpus relief under 28 U.S.C. § 2254.

Respectfully submitted,

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